



November 14, 2018

***Ex Parte Notice***

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**RE: *Connect America Fund, WC Docket No. 10-90***

Dear Ms. Dortch:

On Friday, November 9, 2018, the undersigned, on behalf of NTCA–The Rural Broadband Association (“NTCA”), met with Preston Wise, special counsel to Chairman Ajit Pai, regarding next steps with respect to the Connect America Fund (“CAF”) Phase II auction.

Many NTCA members were identified as prevailing bidders in the CAF Phase II auction, and NTCA welcomed the efforts of the Federal Communications Commission (the “Commission”) to explore ways of promoting both deployment and ongoing operation of networks capable of delivering quality voice and broadband services in rural areas lacking in investment to date. At the same time, NTCA observed that distribution of high-cost universal service fund (“USF”) support must comport with statutory requirements, and that reasonable accountability remains essential to promote effective use of high-cost USF support. To this end, NTCA discussed several points in the meeting.

First, the plain language of Section 254 of the Communications Act of 1934, as amended (the “Act”), mandates that only entities designated as eligible telecommunications carriers (“ETCs”) pursuant to Section 214 of the Act receive federal USF support, and directs that such support be used in connection with the offering of supported telecommunications services.<sup>1</sup> Section 214(e)(1), in turn, indicates that only a telecommunications carrier (“TC”) – defined elsewhere in the statute as a provider of a telecommunications service (“TS”) (a term also defined in the statute)<sup>2</sup> – can be designated as an ETC.<sup>3</sup> In short, the Act is unmistakably clear that: (1) to receive USF, an entity must be an ETC; (2) to be an ETC, an entity must be a TC; and (3) to be a TC, an entity must offer a TS.

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<sup>1</sup> 47 U.S.C. §§ 254(e) and (c)(1).

<sup>2</sup> *Id.* at §§ 153(51) and (53).

<sup>3</sup> *Id.* at § 214(e)(1).

This straightforward statutory analysis is buttressed by judicial and Commission precedent. Specifically, in considering several years ago challenges to the use of USF support to advance broadband availability and affordability, the United States Court of Appeals for the Tenth Circuit upheld the Commission's order premised upon the fact that such goals were ultimately attached to a requirement that ETCs at least offer "voice telephony" on a standalone basis as a telecommunications service.<sup>4</sup> The Commission reaffirmed this in its own brief to the Tenth Circuit, stating that "[s]o long as a provider offers some service on a common carrier basis, it may be eligible for universal service support as an ETC under sections 214(e) and 254(e), even if it offers other services – including 'information services' like broadband Internet access – on a noncommon carrier basis."<sup>5</sup>

Thus, if and when presented with a proposed offering of "voice telephony" in an ETC designation application, the Commission or any reviewing state commission must scrutinize the proposal to confirm that the offering meets the criteria for classification as a telecommunications service. The Commission cannot simply take at face value a claim that any given voice telephony service – for example, one which was recently classified as an information service by one court and which has never been classified as a telecommunications service by the Commission<sup>6</sup> – is a telecommunications service merely by virtue of an ambiguous, high-level pledge to offer it "on a common carrier basis." Rather, a fact-specific analysis must be undertaken to confirm that a telecommunications service will at least be offered by the carrier (even if not procured by any given consumer), with detailed findings as to the parameters (e.g., tariffing or other indicators of public offering) that would make it such.<sup>7</sup>

NTCA next discussed the need for thorough review of technology and system design plans submitted in support of prevailing auction bids. While initial connectivity through the construction of networks is important, the ultimate objective of universal service is to ensure the sustained availability of services that are reasonably comparable in price and quality between rural and urban areas.<sup>8</sup> The real hard work with respect to the CAF Phase II auction begins now, as providers must plan for and build networks that will achieve reasonable comparability and continue to deliver on the promises made in the auction.

Given the importance of bid weighting based upon speed and latency to auction outcomes, NTCA had previously joined a group advocating that the Commission require detailed upfront showings by would-be bidders that they were technically capable of delivering on the promises they would make in the auction. If, for example, a service at certain speed thresholds had never been offered on a widespread commercial basis to tens of thousands of customers across rural areas using a certain technology, it

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<sup>4</sup> *In Re: FCC 11-161*, 753 F.3d 1015, 1048-49 (10th Cir. 2014).

<sup>5</sup> *Id.*, at 1095.

<sup>6</sup> *Charter Advanced Services v. Lange*, No. 17-2290 (8th Cir. 2018); *see also* Brief for the FCC as *Amicus Curiae*, p. 18 (noting that "the FCC has not classified VoIP as a telecommunications service").

<sup>7</sup> *See, e.g., Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, et al., Report and Order 32 FCC Rcd 3459, 3567-3589 (2017), at ¶¶ 267-285 (discussing determinations of common carriage pursuant to fact-specific determinations with respect to the offering under consideration).

<sup>8</sup> 47 U.S.C. § 254(c)(3).

would seem prudent to establish beforehand that the bidder can deliver on that promise in lieu of only checking after awards had been announced.<sup>9</sup> Although the Commission declined to require submission of such information upfront, this makes it all the more important now to undertake careful vetting of the technical capabilities that underlie promises before funding begins to flow and time is lost on projects that potentially cannot deliver.

In furtherance of this objective, NTCA therefore proposes that the technical information submitted by prevailing bidders be available for review by interested parties and stakeholders pursuant to protective order. Such a process would augment the Commission's own analysis, and could be accomplished in relatively short order through a brief window for review and comment – all while appropriately and necessarily protecting proprietary network information from the public domain pursuant to well-established and time-tested protective order procedures. Through such a process, for example, states interested in the reliability of services to be received by their consumers could elect to examine the network design proposals of those that will, in effect, become the 21<sup>st</sup> century provider of last resort for voice and broadband in rural parts of their jurisdictions. Similarly, third-party engineers and other technical resources could provide a useful “second set of eyes” as to any issues that might preclude or complicate service delivery as contemplated by the bids made. NTCA therefore submitted that such a process would provide useful assistance, without any delay, as the Commission seeks to fulfill the statutory mandates of universal service.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the rules of the Commission, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ Michael R. Romano

Michael R. Romano  
Senior Vice President –  
Industry Affairs & Business Development

cc: Preston Wise

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<sup>9</sup> See, e.g., *Ex Parte* Letter from Rebekah P. Goodheart, Jenner & Block, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Nov. 21, 2017), at 1-4.